89-1560

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

RICHARD MORRISON,
Petitioner

V.

STATE OF MAINE,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE STATE OF MAINE

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QUESTIONS PRESENTED

1. Whether the Petitioner's rights to a fair trial and to the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, were violated by the failure of the Maine Superior Court to provide any warnings to the Petitioner concerning the dangers and disadvantages of self-representation.

2. Whether the rigorous procedures required for establishing the existence of a knowing and intelligent waiver of the right to counsel were followed in this case, in the absence of evidence either that the Petitioner received warnings from any judicial officer concerning the dangers of self-representation or that the Petitioner possessed knowledge equivalent to that of an attorney.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND CONSTITUTIONAL PROVISIONS

MISCELLANEOUS

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The Petitioner, Richard Morrison, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Judicial Court of the State of Maine, entered in this proceeding on January 4, 1990.

OPINIONS BELOW

The opinion of the Maine Supreme Judicial Court in State of Maine v. Richard Morrison is reported at 567 A.2d 1350 (Me. 1990), and is reproduced in Appendix A of this Petition. The Order of the Maine Superior Court, dated May 4, 1989, denying the Petitioner's post-verdict motion for a new trial, is unreported and is reproduced in Appendix B of this Petition.

JURISDICTION

The judgment of the Maine Supreme Judicial Court in State of Maine v. Richard Morrison was entered on January 4, 1990, and the Court's mandate issued the same day. The Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment VI:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

United States Constitution, Amendment XIV, §1:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

On August 3, 1988, a Grand Jury sitting in Kennebec County, Maine returned a seven-count indictment against Petitioner Richard Morrison. The indictment alleged that the Petitioner had committed four separate offenses which are denominated "Class A Crimes" under Maine law. At the time of the indictment, the maximum possible sentence for each such Class A Crime was twenty years. The indictment also charged the Petitioner with two separate "Class C Crimes," each of which subjected the Petitioner to a maximum possible sentence of five years. Finally, the indictment charged the Petitioner with one "Class D Crime," involving a maximum possible sentence of less than one year. See, generally, 17-A M.R.S.A. §1252(2)(1983).

Each of the charges in the indictment alleged sexual misconduct by the Petitioner with Kaylene Andrews. Ms. Andrews' mother is the sister of the Petitioner's wife. Ms. Andrews maintained a very close relationship with the Petitioner and his wife, involving frequent extended visits to the Petitioner's home. Counts One through Three of the indictment were based upon an alleged incident of sexual intercourse which occurred during the summer of 1984, when Ms. Andrews was twelve years of age. Counts Four through Six of the indictment related to an alleged incident of sexual intercourse which occurred during the summer of 1985, when Ms. Andrews was thirteen years of age. Count Seven of the indictment involved an alleged

incident of sexually oriented, offensive physical contact which occurred when Ms. Andrews was fifteen years of age.

On August 15, 1988, the Petitioner was arraigned on the foregoing charges. The Petitioner appeared at the arraignment without counsel. The Petitioner entered a plea of not guilty to each count of the indictment. During the arraignment, the following colloquy occurred between the Maine Superior Court and the Petitioner:

> "THE COURT: Mr. Morrison, do you have a lawyer?
>
> THE DEFENDANT: No, sir.
>
> THE COURT: Do you need some time to get one?
>
> THE DEFENDANT: No, sir.
>
> THE COURT: You're going to represent yourself?
>
> THE DEFENDANT: Yes, sir.
>
> . . . . . .
>
> THE COURT: All right. Mr. Morrison? I take it, Mr. Morrison, you are aware of the fact that --

well, first let me ask you. I understand you wish to appear pro se.

THE DEFENDANT: Yes, sir.

THE COURT: I take it that's your own choice and you're not asking to appear pro se because of any financial problems?

THE DEFENDANT: Yes, sir.

THE COURT: All right. Have you had an opportunity to go over the indictment?"

The record of the arraignment discloses nothing further concerning the Petitioner's pro se status.

The Petitioner next appeared before the Superior Court on January 6, 1989, at the call of the criminal docket. At that time the following colloquy occurred between the Court and the Petitioner:

"THE COURT: Are you ready for trial?

THE DEFENDANT: Yes, sir.

THE COURT: Do you have counsel?

THE DEFENDANT: No, sir.

THE COURT: Have you requested counsel?

THE DEFENDANT: No, sir.

THE COURT: Do you want to try this case yourself?

THE DEFENDANT: Yes, sir.

THE COURT: You understand you have a constitutional right to have counsel appointed for you if you can't afford one?

THE DEFENDANT: Yes, sir.

THE COURT: And you want to try the case yourself, that's your selection?

THE DEFENDANT: Yes, sir."

There was no further discussion at the call of the docket concerning the Petitioner's decision to represent himself.

On January 30, 1989, the Petitioner and the State selected a jury in Kennebec County Superior Court. The Petitioner's jury trial commenced and concluded on

January 31, 1989. The Petitioner continued to represent himself throughout the trial process. Neither the trial transcript nor the transcript of a chambers conference prior to jury selection contains any discussion between the Court and the Petitioner concerning his decision to proceed pro se. There is no evidence of any untranscribed discussions or conversations between the Court and the Petitioner regarding his self-representation. The trial Court had no recollection that any such discussions occurred. See Appendix (hereinafter referred to as "App.") B at 2-3.

At trial, there was no evidence which corroborated the allegations of Ms. Andrews that the Petitioner had engaged in sexual activity with her. The

Petitioner took the witness stand and, testifying in narrative fashion, denied all the charges against him. In the words of the Superior Court:

> "The case came down to a straight credibility contest between the defendant and the victim who conducted an extended and sometimes spirited discourse between themselves in front of the jury."

(App. B at 11).

The Petitioner, through testimony and argument, attempted to stress the implausibility of Ms. Andrews' testimony, to the extent that she continued to visit the Morrison residence and she placed herself in vulnerable positions alone with the Petitioner even after she was allegedly raped by him on two occasions. The Petitioner failed to deliver an opening statement to the jury, although he did make a closing argument. The Petitioner did not attempt to attack the

credibility of Ms. Andrews with evidence concerning her reputation for lack of veracity, or with evidence of specific instances reflecting her lack of veracity in the past, although the discovery material obtained by the Petitioner from the State prior to trial contained certain information questioning Ms. Andrews' veracity. See generally, Rule 608, M.R.Evid. The Petitioner did not present any character witnesses to testify on his behalf, although he had intended to do so.[1] In his closing

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[1]The Petitioner argued in his post-verdict motions that he was improperly deterred from presenting character evidence by a threat from the District Attorney that any positive character evidence would be rebutted by the introduction of highly prejudicial evidence concerning sexual relationships among the Petitioner, the Petitioner's wife and other consenting adults. The Superior Court concluded that the Petitioner was not deterred by the District Attorney's threat (App. B at 8-9). The majority opinion of the Maine

argument, the prosecuting attorney told the jury that "this case is going to hinge or does hinge on believability and credibility." Later in his closing argument, the prosecutor asked the jury to:

> "think about when [Ms. Andrews] was cross-examined by the Defendant himself face to face--she sat there and answered his questions, and if you watched her eyes, you saw that her eyes if ever barely ever left the Defendant or left his face."

The jury returned its verdict within one hour after commencing deliberations. The jury found the Petitioner guilty on all seven counts of the indictment. The Petitioner then hired counsel. The Petitioner, through counsel, filed a

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Supreme Judicial Court agreed with the Superior Court as to lack of deterrence (App. A at 13-14). The dissenters on that Court, however, asserted that the Petitioner was "wrongfully persuaded" by the District Attorney to abandon his character defense (App. A at 22-23).

number of motions, including a Motion for a New Trial on the ground that he had not knowingly and intelligently waived his constitutional right to the assistance of counsel. The Sixth Amendment issue which is being presented in this Petition was first raised to the Superior Court in the Petitioner's Memorandum, dated March 9, 1989, in support of his Motion for a New Trial.

A testimonial hearing commenced on March 10, 1989 on the Petitioner's Motion for a New Trial. This hearing resumed and concluded on May 1, 1989. The Petitioner was one of several witnesses during the hearing. He testified on direct examination concerning issues of alleged prosecutorial misconduct and discovery violations by the State. On cross-examination, the prosecuting

attorney sought to elicit facts which arguably were relevant to the issue of the Petitioner's knowledge at the time he chose to represent himself. Testimony at this post-trial hearing revealed that the Petitioner is a former Maine State Police trooper. The Petitioner resigned from the State Police effective December 31, 1987, eight months prior to his indictment, in order to sell insurance and financial services products. Because of his experience as a police officer, the Petitioner had some knowledge of substantive criminal law. He had participated in the investigation or preparation of two felony cases. The remainder of the cases in which the Petitioner had been involved professionally were misdemeanors or traffic offenses. As a police officer,

the Petitioner was assigned primarily to rural patrol duties. The Petitioner had no previous experience as a litigant. Under cross-examination, the Petitioner stated that he distrusts and dislikes attorneys. Although the Petitioner's wife conferred with an attorney on one occasion, at no time prior to the trial did the Petitioner speak with an attorney regarding his case. The Petitioner acknowledged that the District Attorney had informed him that he would prefer to be dealing with defense counsel rather than with the Petitioner directly.

On the second day of hearing on the Petitioner's Motion for a New Trial, the State adduced testimony from David Crook, the District Attorney for Kennebec County. Mr. Crook testified that he spent some amount of time during pretrial

meetings trying to persuade the Petitioner to retain an attorney. Prior to the trial, the District Attorney had three meetings with the Petitioner and two brief telephone conversations. These meetings covered a variety of topics, including the State's prospective evidence and the Petitioner's defense strategy. With regard to the specific content of conversations regarding counsel, the District Attorney testified that he had told the Petitioner that the trial would be "an unfair contest" between an attorney and a layperson.

Testimony also was received from Donald Lizzotte, a detective with the Maine State Police. Initially, Mr. Lizzotte had agreed to testify as a

character witness for the Petitioner. On the day of trial, Mr. Lizzotte informed the Petitioner that he would not testify willingly on the Petitioner's behalf. Mr. Lizzotte regarded the Petitioner as a friend but not a close friend. In response to a question from the Court, Mr. Lizzotte testified that he advised the Petitioner to retain an attorney. In the words of Mr. Lizzotte:

> "And knowing a little bit about courtroom practices and my lack of experience in it, and certainly other police officers lack the experience in courtroom demeanor, I felt that I was obligated to make sure that [the Petitioner] knew that he should get an attorney. He needed professional help."

The hearing on Petitioner's Motion for a New Trial did not contain any other testimony regarding the Petitioner's decision to represent himself or the nature of the advice he may have received

from friends and relatives.

By Order dated May 4, 1989, the Superior Court denied the Petitioner's Motion for a New Trial. The Superior Court rejected the Petitioner's argument that he had acted without knowingly and intelligently waiving his right to counsel (App. B at 12-17). In the words of the Court:

> "Considering the extensive warnings given to the defendant regarding the risks of self-representation by his friends, family and the District Attorney, and considering his strongly held views critical of attorneys, it appears, therefore, that his decision to represent himself was carefully considered, strongly held and unlikely to have been changed by any comments which could have been made by the court at arraignment or otherwise."

(App. B at 15-16). The Court concluded that the failure of the Superior Court "to utter some magical words . . . " to the Petitioner did not justify a new

trial (App. B at 16-17).

On May 18, 1989, the Superior Court formally entered judgment upon the jury verdict and imposed sentence. See Appendix C. On the rape charges, the Petitioner was sentenced to concurrent terms of fifteen years, with all but ten years suspended, followed by probation for three years. On the unlawful sexual contact charges, the Petitioner was sentenced to concurrent terms of three years. On the assault charge, the Petitioner received a consecutive sentence of three hundred sixty-four days, all suspended, followed by probation for one year. The Court conditionally dismissed the gross sexual misconduct charges against the Petitioner in response to the Petitioner's double

jeopardy claim.[2]

The Petitioner then appealed to the Maine Supreme Judicial Court from the judgments of conviction and from the Superior Court's Order denying his Motion for a New Trial. Following briefing and oral argument, the Supreme Judicial Court issued its decision on January 4, 1990. By a margin of 4-2, the Supreme Judicial Court upheld the Petitioner's convictions, with the exception that one of the charges of unlawful sexual contact against the Petitioner was vacated following a concession by the State that there was insufficient evidence to establish that charge.

With respect to the Petitioner's Sixth

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[2]The Superior Court's conditional dismissal of the gross sexual misconduct charges took effect upon the affirmance of the Petitioner's rape convictions by the Maine Supreme Judicial Court (App. A at 1-2, n. 1).

Amendment claim, the Supreme Judicial Court's analysis proceeded in the following manner. First, the Court stated that the absence of pretrial findings by the Superior Court concerning the nature of the Petitioner's decision to represent himself constituted an "implicit finding of fact . . . that Morrison's waiver of counsel and election to represent himself were knowing and intelligent . . . ." (App. A at 3). In the view of the Supreme Judicial Court, this implicit finding was made explicit by the Superior Court's opinion denying the Petitioner's Motion for a New Trial. The Court reasoned that, in order to prevail on appeal, the Petitioner would be required to prove that the Superior Court's "factual finding of knowing and intelligent waiver was clearly

erroneous." (App. A at 3-4).

The Supreme Judicial Court proceeded to review the record "in the light most favorable" to the Superior Court's ruling that the Petitioner knowingly and intelligently waived his right to counsel (App. A at 4). Based upon the testimony of the Petitioner, District Attorney Crook and Mr. Lizzotte at the post-trial motion hearing, the Supreme Judicial Court asserted that there was a "plentitude of evidence" supporting the Superior Court's finding that the Petitioner was made aware of the risks of self-representation (App. A at 7). The Supreme Judicial Court then stated that it would "refuse to create any kind of prophylactic rule" which would require that a conviction be reversed whenever the trial court failed to provide a pro

se defendant with a "Miranda-like warning of the risks of self-representation and the benefits of counsel on the record." (App. A at 10).

The dissenting opinion stated that:

> "The Court has conveniently and erroneously transferred the duty to acquaint the defendant with the dangers of self-representation from the presiding justice to the family and friends of the defendant. Even if such a radical proposition correctly stated constitutional doctrine, the generalized warnings delivered by the family and friends in this case fall far short of adequately acquainting the defendant with the actual perils of self-representation."

(App. A at 15).

The dissenting opinion quoted from Patterson v. Illinois, 487 U.S. 285 (1988) and Faretta v. California, 422 U.S. 806 (1975) as support for its argument that the trial court must acquaint a defendant with the dangers of self-representation prior to trial. The

dissenters concluded that "there is no basis in the record to find that defendant's choice was made with knowledge and appreciation of the dangers of self-representation." (App. A at 20-21). As noted by the dissenters:

> "Defendant was never informed by anyone that by waiving counsel he was giving up the right to challenge the adequacy of his representation after a conviction. He was not informed of the difficulties he encountered in attempting to testify in narrative form and in attempting to cross-examine the victim. Defendant was not warned of the disadvantages he would suffer in attempting to deal with the district attorney."

(App. A at 22).

REASONS FOR GRANTING THE WRIT

I. BY RULING THAT THE PETITIONER KNOWINGLY AND INTELLIGENTLY WAIVED HIS RIGHT TO COUNSEL, THE MAINE SUPREME JUDICIAL COURT DECIDED AN IMPORTANT QUESTION OF CONSTITUTIONAL CRIMINAL PROCEDURE IN A MANNER WHICH CONFLICTS IN PRINCIPLE WITH PATTERSON V. ILLINOIS AND WITH PREVIOUS DECISIONS OF THIS COURT.

The essence of the Sixth Amendment right to have the assistance of counsel "is the opportunity for a defendant to consult with an attorney, and to have him investigate the case and prepare a defense for trial." Michigan v. Harvey, ____U.S.____, 110 S. Ct. 1176, 58 U.S.L.W. 4288, 4289 (March 5, 1990).

> "It bears emphasis that the right to be represented by counsel is among the most fundamental of rights. . . . As a general matter, it is through counsel that all other rights of the accused are protected. . . ."

Penson v. Ohio, 488 U.S. 75, 109 S.Ct. 346, 351-52 (1988). See also Maine v. Moulton, 474 U.S. 159, 168-69 (1985) (the right to counsel is indispensable to the fair administration of justice); United States v. Cronic, 466 U.S. 648, 653-54 (1984).

It is for these reasons that "courts indulge in every reasonable presumption against waiver" of the right to counsel. Brewer v. Williams, 430 U.S. 387, 404 (1977). An effective waiver of the right to counsel cannot be found merely because a defendant has decided voluntarily to proceed without counsel. Rather, the burden is placed upon the State to demonstrate a knowing and intelligent waiver of the right to counsel on the part of the defendant.

> "If the accused . . . is not represented by counsel and had not

> competently and intelligently waived his constitutional right, the Sixth Amendment stands as a jurisdictional bar to a valid conviction and sentence depriving him of his life or his liberty."

Johnson v. Zerbst, 304 U.S. 458, 468 (1938).[3]

In this case the Petitioner acknowledges that he waived "voluntarily" his right to counsel, in the sense that he clearly wished to proceed without an attorney. The record, however, is devoid of proof that the Petitioner knowingly and intelligently waived his right to counsel. In Faretta v. California, 422 U.S. 806 (1975), this Court held that

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[3]The Sixth Amendment right to counsel has been deemed generally applicable to state criminal proceedings through the Due Process Clause of the Fourteenth Amendment. See Gideon v. Wainwright, 372 U.S. 335 (1963). Specifically, the standard for a valid waiver of the right to counsel is equally applicable to federal and state criminal proceedings. See Carnley v. Cochran, 369 U.S. 506, 515 (1962).

implicit within the Sixth Amendment is the right of a criminal defendant to represent himself. But, because the assertion of the right to self-representation necessarily involves the attempted waiver of the Sixth Amendment right to the assistance of counsel, this Court recognized that a defendant's request to proceed without counsel cannot be treated casually by the courts.

> "When an accused manages his own defense, he relinquishes, as a purely factual matter, many of the traditional benefits associated with the right to counsel. For this reason, in order to represent himself, the accused must 'knowingly and intelligently' forgo those relinquished benefits. Johnson v. Zerbst, 304 U.S. at 464-465. Cf. Von Moltke v. Gillies, 332 U.S. 708, 723-724 (plurality opinion of Black, J.). Although a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record

> will establish that 'he knows what he is doing and his choice is made with eyes open.' Adams v. United States ex rel. McCann, 317 U.S. [269], 279 [1942]."

Faretta v. California, 422 U.S. at 835 (emphasis added).

In the wake of Faretta, there was a lack of unanimity among the courts as to the particular procedure to be utilized for determining whether pro se defendants were aware of the dangers and disadvantages of self-representation. The Eleventh Circuit, for example, made "mandatory the duty of a trial judge to hold a waiver hearing regarding the disadvantages of pro se defense." Harding v. Davis, 878 F.2d 1341, 1343 (11th Cir. 1989). By contrast, the First Circuit took the position that an on-the-record colloquy between the court and the pro se defendant, although "almost always

wise", was not mandated. United States v. Campbell, 874 F.2d 838, 845 (1st Cir. 1989). But, despite this diversity of opinion, there was general agreement concerning the need for an informed decision by a pro se defendant. The state of the law of waiver post-Faretta was described in the following manner:

> "[A]ll federal courts construe the Constitution to require a defendant to effectively waive his right to counsel before being granted the right to self-representation. While the practice varies as to the form of warnings and waiver language, there is no question that actions and words sufficient to demonstrate a knowing and intelligent waiver of the right to counsel are deemed essential."

Tuitt v. Fair, 822 F.2d 166, 176 (1st Cir. 1987), cert. denied 484 U.S. 945 (1987).

The law of Sixth Amendment waiver was elaborated upon in the opinion of this Court in Patterson v. Illinois, 487 U.S.

285, 108 S.Ct. 2389 (1988). In holding that a criminal defendant had waived his right to the assistance of counsel during post-indictment questioning by answering voluntarily questions that were posed to him following the administration of Miranda warnings, this Court made it clear that the procedures necessary to establish a valid waiver of the right to counsel vary with the importance of counsel at discrete stages of a criminal proceeding. This Court noted that:

> "an attorney's role at postindictment questioning is rather limited, and substantially different from the attorney's role in later phases of criminal proceedings. At trial, an accused needs an attorney to perform several varied functions - some of which are entirely beyond even the most intelligent layman."

Patterson v. Illinois, 487 U.S. at __, 108 S. Ct. at 2395-96, n.6. In its analysis, this Court astutely linked

procedural rigor with empirical reality.

> "[W]e have taken a more pragmatic approach to the waiver question - asking what purposes a lawyer can serve at the particular stage of the proceedings in question, and what assistance he could provide to an accused at that stage - to determine the scope of the Sixth Amendment right to counsel, and the type of warnings and procedures that should be required before a waiver of that right will be recognized. . . .[R]ecognizing the enormous importance and role that an attorney plays at a criminal trial, we have imposed the most rigorous restrictions on the information that must be conveyed to a defendant, and the procedures that must be observed, before permitting him [to] waive his right to counsel at trial. See Faretta v. California, 422 U.S. 806, 835-836 (1975); cf. Von Moltke v. Gillies, 332 U.S. 708, 723-724 (1948). . . . Thus, we require a more searching or formal inquiry before permitting an accused to waive his right to counsel at trial than we require for a Sixth Amendment waiver during postindictment questioning - not because postindictment questioning is 'less important' than a trial . . . but because the full 'dangers and disadvantages of self-representation' during questioning are less substantial and more

> obvious to an accused than they are at trial."

Patterson v. Illinois, 487 U.S. at ____, 108 S. Ct. at 2397-98 (emphasis added; certain citations omitted).

Although technically dictum, the statements of this Court in Patterson regarding the informational requisites and procedures necessary for a valid finding of a knowing and intelligent waiver of the right to counsel at trial are well grounded in precedent. More than fifty years ago this Court recognized that the Counsel Clause of the Sixth Amendment:

> "embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel."

Johnson v. Zerbst, 304 U.S. at 462-63.

See also Powell v. Alabama, 287 U.S. 45, 68-69 (1932).

It is noteworthy that Patterson cites approvingly to the plurality opinion in Von Moltke v. Gillies, 332 U.S. 708 (1948), in which Justice Black, writing for four members of the Court, spoke to the obligation of the trial court to determine whether a defendant has knowingly and intelligently waived his right to counsel:

> "To discharge this duty properly in light of the strong presumption against waiver of the constitutional right to counsel, a judge must investigate as long and as thoroughly as the circumstances of the case before him demand. . . . To be valid such waiver must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter. A judge can

> make certain that an accused's professed waiver of counsel is understandingly and wisely made only from a penetrating and comprehensive examination of all of the circumstances under which such a plea is tendered."

Von Moltke v. Gillies, 332 U.S. at 723-24 (footnote omitted; emphasis added).

Several courts have interpreted Patterson as confirming the existence of a federal constitutional requirement that the trial court provide some explanation to a pro se defendant concerning the dangers and disadvantages of self-representation. See, for example, United States v. Moya-Gomez, 860 F.2d 706, 731-32 (7th Cir. 1988) (Patterson re-emphasized the need for strict safeguards before permitting waiver of counsel); Gibson v. State, 298 Ark. 43, 764 S.W. 2nd 617, 619 (1989), cert. denied __U.S.__, 109 S.Ct. 3199 (1989) (the

constitutional minimum for a knowing and intelligent waiver of counsel includes warnings by the court). But see Berry v. Lockhart, 873 F.2d 1168, 1170 (8th Cir. 1989) (on-the-record warnings by trial judge to pro se defendant are preferred but are not required).

This case presents this Court with an opportunity to: a) apply the dictum in Patterson to the disposition of a case involving waiver of the right to counsel at trial; b) clarify further the nature of the procedural obligations placed upon trial courts before they can find that a knowing and intelligent waiver of the right to counsel has occurred; and, c) correct clear constitutional error committed by the Maine courts.

II. THE APPROACH TO WAIVER UTILIZED BY THE MAINE SUPREME JUDICIAL COURT IN THIS CASE CONFLICTS WITH THE HOLDINGS OF MOST OF THE FEDERAL AND STATE COURTS WHICH HAVE ADDRESSED THIS ISSUE AND UNDERMINES THE CORE VALUES OF THE SIXTH AMENDMENT.

Upon a careful reading of the opinions of the Maine Superior Court (Appendix B) and the Maine Supreme Judicial Court (Appendix A) in this case, it becomes apparent that the analyses utilized by these Courts are not in conformity with the standards set forth in Patterson, Faretta and Von Moltke. Significantly, both of the judicial opinions in this case appeared to place the burden upon the Petitioner to prove the absence of a knowing and intelligent waiver of his right to counsel. Neither Maine Court referred to the threshold principle requiring indulgence "in every reasonable presumption against waiver" of the right

to counsel. Brewer v. Williams, 430 U.S. at 404. In their eagerness to avoid vacating the Petitioner's convictions, both the Superior Court and the Supreme Judicial Court made conclusory statements concerning "extensive warnings" which are not supported by the record.

The following elements critical to waiver analysis cannot be ignored. First, prior to trial no judicial officer engaged in any conversation with the Petitioner concerning the dangers of self-representation, the advisability of retaining counsel or the competence of the Petitioner to defend his own cause. The brief discussions between the Petitioner and the Court prior to trial in which the Petitioner answered "yes, sir" or "no, sir" to questions concerning the voluntariness of his decision provide

a woefully inadequate basis for inferring, let alone concluding, that he made a knowing and intelligent waiver of his right to counsel.

Second, although the District Attorney, as well as certain friends and relatives of the Petitioner, advised the Petitioner to hire an attorney, there is no evidence that any person warned him of any of the specific dangers created by self-representation. See the dissenting opinion of the Supreme Judicial Court (App. A at 22), for examples of what the Petitioner was not told. There is a substantial difference between advice from friends that one ought to have counsel, and warnings from the Court as to why one ought to have counsel.

Third, although the Petitioner had a background in law enforcement, the record

indicates that he had very limited experience regarding felony prosecutions and there is no evidence that the Petitioner had any legal training.[4] Finally, there is nothing in the record to suggest that the Petitioner was using his pro se status in an attempt to delay trial or otherwise manipulate the criminal justice system, as other defendant have done through serial dismissals of counsel and requests for continuances. Indeed, the fact that the Petitioner had refused to speak to any lawyer about his case should have rendered the Superior Court even more vigilant in making a searching

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[4]Compare to United States v. Campbell, 874 F.2d at 846 (pro se defendant was an experienced criminal defense attorney); Neal v. Texas, 870 F.2d 312, 315 (5th Cir. 1989) (pro se defendant was a former district attorney).

examination of the Petitioner's knowledge.

The validity of a waiver of the right to counsel is a mixed question of law and fact, the resolution of which is governed by federal constitutional standards. See Norman v. Ducharme, 871 F.2d 1483, 1486 (9th Cir. 1989). Cf. Erie Telecommunications, Inc. v. City of Erie, 853 F.2d 1084, 1094 (3rd Cir. 1988) (waiver of First Amendment rights). By treating the Superior Court's waiver of counsel ruling as a purely factual finding which could be overcome by the Petitioner only upon a showing of clear error (App. A at 3-4), the Supreme Judicial Court turned the constitutional presumption of non-waiver on its head. Surely the Constitution does not permit a different waiver standard to be applied to a defendant

merely because he formerly worked as a police officer. See United States v. Harris, 683 F.2d 322, 325 (9th Cir. 1982) (knowledge of the charges and the potential penalties is not to be equated with knowledge of the dangers of self-representation).

The Petitioner does not contend that waivers of the right to counsel are invalid absent the utterance of "some magical words" (App. B at 16) or the delivery of a formulaic "Miranda-like warning" (App. A at 10). The Petitioner does contend that absent extraordinary circumstances (such as a defendant who is an attorney or a defendant who previously has represented himself against similar charges) which are not present in this case, the trial-level court must provide some warnings to a defendant concerning

the dangers of self-representation. The court may tailor its warnings in order to take into account a pro se defendant's apparent level of competence, intelligence, and knowledge. But the court may not dispense completely with such warnings unless there is compelling evidence that they would serve no informative purpose. This implicates the core value of the Counsel Clause, which is to improve the likelihood of fair and correct adjudications.

> "Whatever the motive behind a defendant's wish to appear pro se, a judge cannot disregard the long-term interest of the accused in having guilt or lack of guilt fairly determined. Except in the most unusual circumstances, a trial in which one side is unrepresented by counsel is a farcical effort to ascertain guilt."

American Bar Association Standards For Criminal Justice, Commentary on Standard 6-3.6(a)(rev. ed. 1986).

Courts in a substantial majority of American jurisdictions have held that it is incumbent upon the trial court to inform a pro se defendant in some manner of the dangers and disadvantages of self-representation. In addition to the cases previously cited, see United States v. Allen, 895 F.2d 1577, (10th Cir. 1990); Cross v. United States, 893 F.2d 1287, 1290-91 (11th Cir. 1990); Stano v. Dugger, 889 F.2d 962, 966 (11th Cir. 1989); Commonwealth v. Burbank, 27 Mass. App.97, 534 N.E.2d 1180 (1989), rev. denied, 405 Mass. 1201, 541 N.E.2d 344 (1989); State v. Kordower, 229 N.J. Super. 566, 552 A.2d 218, 224 (1989); Johnson v. State, 760 S.W. 2d 277, 279 (Tex. Cr. App. 1988); State v. Boswell, 92 Or. App. 652, 760 P.2d 276, 278 (1988); State v. Pruitt, 322 N.C. 600,

369 S.E.2d 590, 593 (1988); State v. Van Sickle, 411 N.W.2d 665, 666-67 (S.D. 1987); State v. Graham, 513 So. 2d 419 (La. App. 1987); United States v. Brown, 823 F.2d 591, 599 (D.C. Cir. 1987); McMahon v. Fulcomer, 821 F.2d 934, 944 (3d Cir. 1987); People v. Sawyer, 57 N.Y.2d 12, 453 N.Y.S.2d 418, 423, 438 N.E.2d 1133 (1982), rearg. dism. 57 N.Y.2d 776, 454 N.Y.S.2d 1033, 440 N.E.2d 1343 (1982), cert. denied, 459 U.S. 1178 (1983).

Appropriate warnings enhance the administration of criminal justice while reducing the risk of injustice. In the words of one court:

> "The judge should do more than ask pro forma questions; he should explain the difficulties inherent in any criminal trial, including the importance of evidentiary rules. By engaging in this inquiry on the record, the trial court will safeguard

> the right to counsel by ensuring that all waivers are made knowingly and voluntarily. Additionally, the court will safeguard the integrity of the judiciary by removing a defendant's ability to manipulate the system and ensure the reversal of his convictions."

Strozier v. Newsome, 871 F.2d 995, 997, n. 4 (11th Cir. 1989).

The Petitioner recognizes that this Court cannot correct every aberrant ruling on constitutional law made by the highest court of a State. But in this case, review of the judgment of the Supreme Judicial Court would serve to correct a fundamental injustice and would provide guidance to all other courts concerning their procedural obligations with respect to pro se defendants in light of Faretta and Patterson.

CONCLUSION

For the reasons set forth in this Petition, a Writ of Certiorari should issue to review the judgment and opinion of the Maine Supreme Judicial Court.

Dated: March 30, 1990

Respectfully submitted,

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APPENDIX A

MAINE SUPREME JUDICIAL COURT
Reporter of Decisions
Decision No. 5302
Law Docket No. Ken-89-202

STATE OF MAINE

v.

RICHARD MORRISON

Argued November 15, 1989
Decided January 4, 1990

Before McKUSICK, C.J., and ROBERTS, WATHEN, GLASSMAN, CLIFFORD, and HORNBY, J.J.

McKUSICK, C.J.

In his Superior Court (Kennebec County, Alexander, J.) jury trial on charges of rape, gross sexual misconduct, unlawful sexual contact, and assault,[1] Richard Morrison, a

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[1]Morrison was tried on two counts of rape (17-A M.R.S.A. §252 (1983)); two counts of gross sexual misconduct (17-A M.R.S.A. §253 (Supp. 1989)); two counts of unlawful sexual contact (17-A M.R.S.A. §255 (Supp.1989)); and one count of assault (17-A M.R.S.A §207) (1983 and Supp. 1989)). The jury returned a guilty verdict on all seven counts. Since each of the two counts of gross sexual misconduct factually involved the same sexual activity as a corresponding rape count, the Superior Court

former Maine State Police trooper, represented himself until after the jury returned a guilty verdict on all counts. Soon thereafter, and before sentencing, Morrison through retained counsel moved for a new trial, contending that he had not made a knowing and intelligent waiver of his federal and state constitutional right to counsel. After a testimonial hearing on March 10 and May 1, 1989, the court denied his motion, entered judgment on the jury verdict, and imposed sentence. Morrison appeals, again relying principally on his defective-waiver-of-counsel argument. We also reject that argument.

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entered a judgment of conviction on the rape counts and dismissed the gross sexual misconduct counts, with the dismissal to take effect when the judgments on the rape counts became final. See State v. Walsh, 558 A.2d 1184, 1186-87 (Me. 1989). Since we make the rape convictions final by affirming them, the Superior Curt's dismissal of the gross sexual misconduct counts takes effect upon the issuance of our mandate.

I.

Morrison had appeared pro se both at his arraignment and later at the docket call preceding trial, and on both occasions in colloquy with the court (Brody, C.J.) he expressly declared his desire to represent himself at trial without an attorney. The implicit finding of fact made by both the justice presiding in pretrial matters and by the justice at trial, that Morrison's waiver of counsel and election to represent himself were knowing and intelligent, was made explicit in the trial justice's opinion denying Morrison's motion for a new trial. To prevail on appeal, Morrison must persuade us that the Superior Court justices' factual finding of knowing and intelligent waiver was clearly

clearly erroneous.[2] We are not so persuaded. "Whether an accused has properly waived his right to counsel must be determined by the trial court based on the particular facts and circumstances of each case." State v. Walls, 501 A.2d 803, 805 (Me. 1985) (citations omitted). As established long ago by Johnson v. Zerbst, 304 U.S. 458, 464 (1938):

> The determination of whether there has been an intelligent waiver of right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.

We review "the record in the light most favorable to the court's ruling to determine whether the record will support a finding of a knowing and intelligent waiver." State v.

2
In State v. Tomah, 560 A.2d 575, 576 (Me. 1989), we misspoke of reviewing the trial court's finding of waiver for abuse of discretion.

Walls, 501 A.2d at 805. Here the question is, then, whether Morrison at the critical times in fact knowingly and intelligently chose to represent himself; whether Morrison "[knew] what he [was] doing and his choice [was] made with eyes open." Faretta v. California, 422 U.S. 806, 835 (1975) (quoting Adams v. United States ex rel. McCann, 317 U.S. 269, 279 (1942)).

Normally the record on a direct appeal is not adequate for us to review a defendant's claim that his waiver of counsel was defective. As we recognized in State v. Walls, post-conviction review is "a proceeding more conducive to the development of evidence that is more sharply focused" on "the particular facts and circumstances surrounding that case," including the background, experience, and conduct of the accused, 501 A.2d at 805-06, all of which are made determinative by Johnson v.

Zerbst, 304 U.S. 464. In the case at bar, however, the record on direct appeal is adequate for our review. The presentence proceedings on Morrison's motion for a new trial were the functional equivalent of post-conviction proceedings in that both Morrison and the State had an unrestricted opportunity to develop all the evidence "sharply focused" on the particular facts and circumstances of Morrison's waiver of counsel at his just-completed trial.

After hearing the evidence on Morrison's motion for a new trial, the trial court affirmatively found that:

> The defendant was knowledgeable of his right to counsel, and having considered the risks or at least having been made aware of the risks, chose to represent himself .... In the context of this case, with the advice provided to the defendant by family and friends, the court has no question that the defendant reached a knowing and intelligent decision to represent himself in this matter.

A plenitude of evidence supports this factual finding. During his years in law enforcement Morrison had court experience in helping the prosecution in at least two felony cases and many lesser cases. After his indictment he was repeatedly urged to engage counsel by his wife, by fellow members to the Maine State Police, and by other friends. For example, one of Morrison's best friends in the State Police, himself knowledgeable in criminal matters from his law enforcement career, spent 45 minutes to an hour on the telephone with Morrison trying to persuade him to hire a lawyer or at least to consult one. Morrison's wife went further and contacted a lawyer, the lawyer who eventually represented Morrison at the motion for new trial and in this appeal, only to have Morrison become angry with her and refuse the lawyer's help.

In the month before trial Morrison met

several times with the District Attorney, who, as the trial justice found, repeatedly advised Morrison "of the risks of self-representation, the fact that he would be opposed by skilled counsel and the importance of having skilled counsel to assist him." In the packet of discovery materials turned over by the District Attorney, Morrison received a copy of the sentencing rules that the District Attorney understood from experience that the trial justice generally followed, and so Morrison was made aware in very concrete terms of the substantial sentence he was facing. Although none of these persons thus involved with Morrison had any legal responsibility to warn him of the risks he assumed by proceeding pro se, the fact that they did give him these repeated warnings confirms as a fact that he made the choice to go it along "know[ing] what he was doing and ... with [his] eyes open."

The trial justice specifically found that Morrison "present[ed] himself in court and otherwise as a bright, self-confident, polite and knowledgeable individual." He did not refuse counsel for financial reasons. Morrison had a strongly held dislike of attorneys, and despite repeated warnings he never budged from his early decision to conduct his own defense at trial.

The question here is not whether in hindsight it appears that Morrison acted in his own best interest or made an objectively wise decision to represent himself. The record reflects that he made an informed decision to proceed pro se -- as is his constitutional right -- in what he believed at that time to be his own best interest. The Superior court made no clear error in finding a knowing and intelligent waiver of counsel.

Once we uphold the Superior Court's

finding that Morrison in fact waived counsel knowingly and intelligently, nothing is left to his waiver of counsel issue on this appeal. We refuse to create any kind of prophylactic rule by which the conviction of any pro se defendant would be automatically vacated, regardless of the particular facts and circumstances surrounding that defendant's waiver of counsel, if the trial court failed to give the defendant Miranda-like warning of the risks of self-representation and the benefits of counsel on the record. Neither Supreme Court case law nor our own lays out any such prophylactic rule. If our recent opinion in State v. Tomah, 560 A.2d 575 (Me. 1989), can be read to that effect, we take this opportunity to disavow that reading.

II.

Count 6 of the indictment charged Morrison with unlawful sexual contact with the then 13-

then 13-year-old victim during the summer of 1985. The State concedes that the record contains only evidence of a "sexual act" during the summer of 1985 and no evidence of "sexual contact" within the definition of 17-A M.R.S.A. §251(D) (Supp. 1989).[3] Morrison therefore must be acquitted on Count 6 because although the record supports the rape conviction during that summer, the evidence does not sustain the jury verdict of unlawful sexual contact. See State v. Walker, 512 A.2d 354, 356 (Me. 1986) ("sexual act" distinguished from "sexual contact").

3
17-A M.R.S.A. §251 (Supp. 1989) established the following definitions in pertinent part:

C. "Sexual act" means:

(1) Any act between 2 persons involving direct physical contact between the genitals of one and ... the genitals of the other. ...

D. "Sexual contact" means any touching of the genitals .. other than as would constitute a sexual act. ...

III.

We find no merit in any of defendant's other contentions on appeal. Since Morrison did not object at trial to any of the alleged errors, we must apply an "obvious error" standard of review. See State v. True, 438 A.2d 460, 467-69 (Me. 1981). When we do, we find in each instance that if any error at all exists, it is not one that "is so highly prejudicial and so taints the proceeding as virtually to deprive [defendant] of a fair trial." Id. at 468 (quoting State v. Langley, 242 A.2d 688, 690 (Me. 1968)).

Literally read, the record suggests that the trial court may have instructed Morrison that he could put on character witnesses to testify as to his reputation for truthfulness only if the court called his truthfulness into question. Despite any such misstatement, however, Morrison testified at the new trial

hearing that he felt free to present character witnesses if the State had attacked his credibility. Furthermore, since the State in fact at trial never raised such an attack, "evidence in support of the defendant's reputation for truth and veracity [was] not admissible." State v. Wells, 423 A.2d 221, 226 (Me. 1980); M.R.Evid. 608.

Contrary to Morrison's further contentions, we find no "prosecutorial misconduct" that approaches the standard of obvious error. In denying the motion for new trial the trial court found that the District Attorney had committed no discovery violations, and that factual finding is fully supported by the record. See Harmon v. Emerson, 425 A.2d 978, 981 (Me. 1981). It also appears from the record that Morrison did not rely on the District Attorney's advice as to the admissibility of a character witness on

veracity, since Morrison ignored that advice and in any event subpoenaed the witness to testify. Any deterrence of Morrison's use of the defense of a normal adult sex life -- even assuming he contemplated using it -- would relate only to a collateral issue that would not have affected the outcome of the case. And both pieces of allegedly inadmissible evidence adduced by the State had at least marginal relevance to the case and in any event were not so prejudicial as to work any manifest injustice. Finally, neither in his opening statement nor in his closing argument did the prosecutor make any comment that in context was improper. See State v. Walsh, 558 A.2d 1184, 1188 (Me. 1989).

The entry is:

> Judgment on Count 6 vacated; remanded for entry of judgment of acquittal. Judgments on the other counts affirmed.

Roberts, Clifford and Hornby, JJ., concurring.

WATHEN, J., with whom GLASSMAN, J., joins dissenting.

I must respectfully dissent. The Court has conveniently and erroneously transferred the duty to acquaint the defendant with the dangers of self-representation from the presiding justice to the family and friends of the defendant. Even if such a radical proposition correctly stated constitutional doctrine, the generalized warnings delivered by the family and friends in this case fall far short of adequately acquainting the defendant with the actual perils of self-representation. Moreover, the record before us presents a classic illustration of the prejudice that results from self-representation.

A criminal defendant has both a federal

and state constitutional right to represent himself at trial. U.S. Const. amend. VI; Me. Const. art. I, §6. When a defendant elects to exercise the right of self-representation, however, the court is required to determine that he has knowingly and intelligently waived the benefits associated with the right to counsel.

> When an accused manages his own defense, he relinquishes, as a purely factual matter, many of the traditional benefits associated with the right to counsel. For this reason, in order to represent himself, the accused must "knowingly and intelligently" forgo those relinquished benefits. Although a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that "he knows what he is doing and his choice is made with eyes open."

Faretta v. California, 422 U.S. 806, 835 (1975) (citations and quotations omitted). The United

States Supreme Court has adopted a pragmatic approach to the waiver question. The type of warnings and procedures required at any stage of a criminal proceeding depends upon the purposes a lawyer can serve and the assistance he could provide at that particular stage.

> At one end of the spectrum, we have concluded there is no Sixth Amendment right to counsel whatsoever at a postindictment photographic display identification, because this procedure is not one at which the accused "require[s] aid in coping with legal problems or assistance in meeting his adversary." See United States v. Ash, 413 U.S. 300, 313-320 (1973). At the other extreme, recognizing the enormous importance and role that an attorney plays at a criminal trial, we have imposed the most rigorous restrictions on the information that must be conveyed to a defendant, and the procedures that must be observed, before permitting him [to] waive his right to counsel at trial. See Faretta v. California, 422 U.S. 806, 835-836 (1975); cf. Von Moltke vs. Gillies, 322 U.S. 708, 723-724 (1948). In these extreme cases, and in others that fall between these two poles, we have defined the scope of the right to counsel by a pragmatic assessment of the usefulness of counsel to the

> accused at the particular proceeding, and the dangers to the accused of proceeding without counsel. An accused's waiver of his right to counsel is "knowing" when he is made aware of these basic facts.

Patterson v. Illinois, 56 U.S.L.W. 4733, 4736 (U.S. June 21, 1988) (No. 86-7059).

Until today, this Court has held that a defendant must be acquainted with the dangers of self-representation prior to trial and the record must reflect that his choice was made with knowledge of the consequences. State v. Tomah, 560 A.2d 575 (Me. 1989); State v. Walls, 501 A.2d 803, 805 (Me. 1985). When, as in this case, the trial court allows a defendant to represent himself without an express finding of waiver, we review the record "in the light most favorable to the court's ruling to determine whether the record will support a finding of a knowing and intelligent waiver." Id.

At arraignment, the entire discussion between the accused and the presiding justice (Brody, C.J.) regarding representation was as follows:

> THE COURT: Mr. Morrison, do you have a lawyer?
>
> THE DEFENDANT: No, sir.
>
> THE COURT: Do you need some time to get one?
>
> THE DEFENDANT: No, sir.
>
> THE COURT: You're going to represent yourself?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: I take it that's your own choice and you're not asking to appear pro se because of any financial problems?
>
> THE DEFENDANT: Yes, sir.

At a subsequent call of the criminal docket the following colloquy occurred:

> THE COURT: Do you have counsel?
>
> THE DEFENDANT: No, sir.
>
> THE COURT: Have you requested counsel?

THE DEFENDANT: No, sir.

THE COURT: Do you want to try this case yourself?

THE DEFENDANT: Yes, sir.

THE COURT: You understand you have a constitutional right to have counsel appointed for you if you can't afford one?

THE DEFENDANT: Yes, sir.

THE COURT: And you want to try the case yourself, that's your selection?

THE DEFENDANT: Yes, sir.

"[W]aiver is dependent on the facts and circumstances of each case, [and] it is not possible to specify the elements of an adequate basis for a finding of waiver." Tomah, 560 A.2d at 576. Despite the fact that the trial justice informed the defendant of his constitutional right to an attorney and determined that his choice of self-representation was not the result of indigency, there is no basis in the record to find that

defendant's choice was made with knowledge and appreciation of the dangers of self-representation. See Tomah, 560 A.2d at 576; State v. Gaudette, 431 A.2d 31, 32 (Me. 1981). Moreover, there is absolutely no basis for the conclusion that the rigorous standards and procedures imposed by the federal constitution have been met. See Patterson v. Illinois, 56 U.S.L.W. at 4736.

The Court concludes that the evidentiary record created at the hearing on the motion for a new trial supports the adequacy of the waiver. I disagree. It is the trial court's responsibility to advise the accused as to the dangers of self-representation and ensure, before he encounters trial, that defendant's choice is made with his eyes open. The fact that defendant was advised by family and friends to get a lawyer before trial does not enhance the evidentiary basis for the earlier

ruling of the justice presiding at the arraignment and call of the docket. The ruling on waiver must be based on information reflected in the record. Tomah, 560 A.2d at 576 n.1. The record before us does not support the finding that defendant knowingly and intelligently waived his right to counsel.

Even if we look at the warnings delivered by family and friends, they consist of nothing more than the general warning that he should be represented. Defendant was never informed by anyone that by waiving counsel he was giving up the right to challenge the adequacy of his representation after a conviction. He was not informed of the difficulties he encountered in attempting to testify in narrative form and in attempting to cross-examine the victim. Defendant was not warned of the disadvantages he would suffer in attempting to deal with the district attorney. In fact, he was called for

a plea bargaining session and was wrongfully persuaded by the district attorney that if he presented witnesses to testify to his good character, the State would be able to introduce highly prejudicial and embarrassing evidence of an unrelated sexual relationship. Despite the Court's strained analysis the fact remains that defendant presented no character evidence.

I would vacate the judgment. Because the dangers of self-representation are so apparent and yet so easily forgotten, we must protect the right to counsel with more rigorous procedures than those employed in this case.

APPENDIX B

STATE OF MAINE
KENNEBEC, ss.

SUPERIOR COURT
CRIMINAL ACTION
Docket No. CR-88-365

STATE OF MAINE

vs.

ORDER

RICHARD MORRISON

This matter is before the court on defendant's motion for a new trial. The defendant was convicted, after a jury trial, of two counts of rape, two counts of gross sexual misconduct, two counts of unlawful sexual contact, and one count of assault resulting from sexual contact with a niece. The defendant is a former Maine State Police Trooper who represented himself from the beginning of the investigation in early 1988 through return of the jury verdict on January 31, 1989. Counsel was retained shortly after the defendant was convicted.

The motion for a new trial and memoranda

in support of the motion present a number of issues. In support of the motion, the defense has presented a trial transcript and several other transcripts from preliminary proceedings. The court notes that the trial transcript is not complete in that it does not include on the record discussions of the parties which occurred after close of the evidence prior to instructing the jury on January 31. It may also be, as the State has indicated, that there was another on the record chambers discussion during the course of the trial. Because the defendant was appearing pro se, it was the court's practice that all discussions with the defendant and the State involving the case were on the record.

The court does not recall any discussion in these other on the record conferences which would directly affect the issues presented by

the motion for a new trial.

Turning to the specific points in the motion for a new trial, the court will address those points individually:

1. Discovery violations:

The defense asserts that the defendant was not provided certain available discovery in a timely manner. However, the record does not support this contention. To the contrary, it appears that, because of the defendant's former position as a Maine State Police Trooper, he was kept advised of the course of the investigation and case developments to a much greater degree than most defendants. With regard to documents, the State's file including the documents in State's Exhibit 2 was made available to the defendant shortly after indictment in August of 1988. Other significant investigatory documents, State's Exhibit 3 and State's Exhibit 4, were made

available to the defendant promptly after they became available in January of 1989.

The only documents which appear not to have been made available to the defendant shortly after indictment or contemporaneously with their development are some of the documents in State's Exhibit 5 (which was also Exhibit A to Defendant's affidavit). However, the "heart" letter from Kaylene included in State's Exhibit 5 was also part of State's Exhibit 2 which the defendant received in August of 1988. The other materials in State's Exhibit 5 appear to be either written notes with information similar to that which appeared in State's Exhibit 2 or materials which related primarily to discussion of the relationship between the victim and her boyfriend. This material, State's Exhibit 5, was turned over to the defendant a week or two before trial. The delayed disclosure, if any,

appears to have created no prejudice in light of the knowledge of the defendant regarding issues involving the victim and her boyfriend. Accordingly, the court finds no discovery violations. The defendant was provided and had an opportunity to review the discovery to which he was entitled in a timely manner.

2. Loss of character witness:

The defendant asserts that a witness whom he intended to call to testify as to his reputation for truth and veracity, Trooper Donald Lizotte, was improperly induced not to testify by the State. The record does not support this claim. The defendant planned to call Trooper Lizotte to testify as a character witness regarding truthfulness. Trooper Lizotte learned that the defendant, prior to trial, was going to take a polygraph. On his own initiative, Trooper Lizotte inquired and found that the defendant had failed the

polygraph test. Because of his own views regarding the validity of polygraph tests, Trooper Lizotte determined, based on that knowledge, that he could not testify favorably regarding the defendant's character for truthfulness. He advised the defendant of this prior to trial, and, as a result, the defendant did not call him at trial. The prosecutor in no way. promoted or influenced this decision by Trooper Lizotte that he could not testify favorably for the defendant. Thus, his change of position is not grounds for a new trial.

3. Deterrence from presenting evidence:

The defense asserts that the defendant was deterred from presenting both character witnesses and witnesses who might have testified as to his normal sexual behavior or reputation as a result of threats by the State that, if he presented such witnesses, the

State would call witnesses to testify to certain potentially embarrassing incidents involving defendant's adult sexual activity. Initially, it is evident that the discussion where the State suggested that, if such witnesses were presented, the State might present witnesses to make the defendant look like a "pervert" did not prevent the defendant from planning to present a truthfulness and veracity character defense. Until the very day of trial, he planned to present such evidence through Trooper Lizotte. He did not present the evidence as a result of Trooper Lizotte's determination that he could not longer testify favorably regarding truth and veracity. Thus, the truth--veracity presentation was not deterred as a result of the State's prior discussion of the possible use of sexual history testimony.

Testimony regarding the defendant's adult

sexual activity or reputation may have been deterred by such threats. However, it is not clear such testimony regarding an active, heterosexual, adult sex life would have been essential or even admissible on the question of whether the defendant had committed the acts alleged. The question of testimony regarding such active, heterosexual, adult relationships most frequently comes up in situations where homosexual relationships with a child are alleged. That was not the case here. Further, it is not clear that had such testimony suggesting normal adult sex activity been admitted, the testimony which the State proposed to present would have been excluded under Rule 403 or otherwise. As the question was never presented, the context in which it would have arisen and thus the outcome of a Rule 403 ruling is difficult to predict.

Since it is clear that the State's

threatened use of evidence in this area did not deter the defendant from planning to present a "truth and veracity" defense and since it is not clear that the defendant's adult sex activity evidence would have been admitted or that the State's potentially embarrassing evidence would have been excluded, the motion for new trial based on this grounds must be denied.

As this evidence related entirely to collateral issues, it is also not the type of evidence which, even if it were presented, would clearly have changed the result.

4. Opening reference to other officers:

The defense asserts that, during opening, the prosecutor made an improper reference to other officers who might testify. In the context in which it was presented, the court finds no problem justifying a new trial in such a reference. During the course of

jury selection, the jury panel had heard an extensive witness list read which included a number of persons identified as police officers. They were thus aware that there was a potential for such officers being called to testify. Further, the defendant had indicated a plan, himself, to call several officers in the course of his case. Considering the context in which they was given, the State's comments therefore can in no way be viewed as improper.

The cases the defense cites relate mainly to closing arguments where there are improper references to material not presented in evidence during the course of the trial. Such references in closing must, of course, be viewed vigorously since, at that time, the parties know what the evidence before the jury is. Casual comments made in opening, such as those which the defense objects to, have a

much lesser potential for prejudice. First, it is unlikely that the jury gave them great significance, not then knowing themselves what the course of the trial is likely to be. Second, no such reference was provided in the closing. It is difficult to see how the casual reference to which the defense objects, in the State's opening, affected the jury's verdict in any way. The case came down to a straight credibility contest between the defendant and the victim who conducted an extended and some times spirited discourse between themselves in front of the jury. The comments by the prosecutor in opening are not a basis for a new trial.

4. Sexual arousal reference:

The defense objects to testimony by State Police Detective Cormier regarding comments which the defendant made suggesting that he was sexually aroused by the victim. These

comments, although not essential, were relevant to the mens re elements of the unlawful sexual contact and assault charges pending before the court. They are not a basis for a new trial.

5. Awareness of right to counsel:

The most significant issue raised in the motion for a new trial is the question of the defendant's awareness of his right to counsel and the extent to which he knowingly and intelligently waived his right to counsel in choosing to represent himself.

In examining this issue, it is important to address the questions which are not in dispute. First, the defendant was and is not indigent. He possessed the ability to retain counsel had he desired to do so. Second, there is no question that the defendant knew he had a right to counsel to assist him during the trial.

Thus, the question comes down to the issue of whether, knowing he had a right to the assistance of counsel, the defendant intelligently waived his right to counsel and chose to represent himself. On the question of the intelligent waiver of right to counsel, the issue is not whether the defendant did the right thing. Instead, the issue is whether the defendant, in reaching his decision to represent himself, was fully aware of the risks of self-representation and the values of attorney representation. This is not a decision to be made based on hindsight but based on the state of the defendant's knowledge and understanding at the time he chose to represent himself.

The defendant presents himself in court and otherwise as a bright, self-confident, polite and knowledgeable individual. Perhaps, because of the defendant's intelligent and

self-assured air, the court did not either at arraignment or call of the docket conduct any extensive inquiry into the defendant's choice to represent himself. However, the question in examining whether a person makes a knowledgeable and intelligent choice not to represent himself does not depend on whether any particular judge, at any particular time uses any magical words or asks any magical questions. Rather it must depend on the state of the defendant's knowledge at the time he is making these critical decisions.

The record indicates that, while the court may not have extensively inquired into the defendant's choice to represent himself, the defendant was repeatedly urged by friends, including members of the Maine State Police, to get counsel to assist him. His wife urged him to do the same, and at one time his wife contacted counsel only to have the defendant

become angry with her when he found out about it. Further, in the month prior to trial, the defendant was repeatedly urged to seek assistance of counsel when he met with the District Attorney. During these times, the District Attorney advised the defendant of the risks of self-representation, the fact that he would be opposed by skilled counsel and the importance of having skilled counsel to assist him.

The evidence also indicates that the defendant disliked attorneys and, from early in the investigation, decided to represent himself without assistance of counsel. He persisted in this view despite very strong urgings of close friends and former colleagues on the State Police, his wife and the District Attorney throughout the investigation, preparation and trial of the case. Considering the extensive warnings given to

the defendant regarding the risks of self-representation by his friends, family and the District Attorney, and considering his strongly held views critical of attorneys, it appears, therefore, that his decision to represent himself was carefully considered, strongly held and unlikely to have been changed by any comments which could have been made by the court at arraignment or otherwise. That being the case, the court determines that the defendant was knowledgeable of his right to counsel, and having considered the risks or at least having been made aware of the risks, he chose to represent himself. As the decision was reached based on knowledge of the risks and the potential values of counsel, it cannot be argued that somehow the failure of the court, at arraignment, to utter some magical words that had already been told to the defendant by others, and would again be

told to him by others, justifies a new trial. The question is not what the court said at arraignment but whether the defendant at the critical times knowingly and intelligently chose to represent himself. In the context of this case, with the advice provided to the defendant by family and friends, the court has no question that the defendant reached a knowing and intelligent decision to represent himself in this matter.

Therefore, for the reasons stated above, the court ORDERS: Defendant's motion for a new trial is DENIED.

Dated: May 4, 1990

DONALD G. ALEXANDER
JUSTICE, SUPERIOR COURT

APPENDIX C

STATE OF MAINE
SUPERIOR COURT JUDGMENT AND COMMITMENT

Docket No.	County	Date	DOB
CR 88-365	Kennebec	May 18, 1989	

State of Maine v. Defendant's Name Residence
Richard Morrison

Offense(s) charged:	Charged by:
Rape	x indictment
Count 1	___ information
Class A	___ complaint

Plea: Not guilty

Offense(s) convicted:	Convicted on:
Rape	___ plea of guilty
Count 1	___ plea of nolo
Class A	x jury verdict
	___ court finding

IT IS ADJUDGED THAT THE DEFENDANT IS GUILTY OF THE OFFENSES AS SHOWN ABOVE AND CONVICTED.

x IT IS ADJUDGED THAT THE DEFENDANT BE HEREBY COMMITTED TO THE SHERIFF OF THE WITHIN NAMED COUNTY OR HIS AUTHORIZED REPRESENTATIVE WHO SHALL WITHOUT NEEDLESS DELAY REMOVE THE DEFENDANT TO:

x The custody of the Commissioner of the Department of Corrections, at a facility designated by the Commissioner, to be punished by imprison-

ment for a term of 15 years

_____

x IT IS ORDERED THAT ALL (BUT) 10 years OF THE FOREGOING SENTENCE BE SUSPENDED AND THE DEFENDANT BE COMMITTED TO THE CUSTODY AND CONTROL OF THE DIVISION OF PROBATION AND PAROLE FOR A TERM OF 3 years UPON CONDITIONS ATTACHED HERETO AND INCORPORATED BY REFERENCE HEREIN. SAID PROBATION TO COMMENCE (_____)(UPON COMPLETION OF THE UNSUSPENDED TERM OF IMPRISONMENT). THE DEFENDANT SHALL SERVE THE INITIAL PORTION OF THE FOREGOING SENTENCE AT_____

_____

IT IS FURTHER ORDERED THAT THE CLERK DELIVER A CERTIFIED COPY OF THIS JUDGMENT AND COMMITMENT TO THE SHERIFF OF THE ABOVE NAMED COUNTY OR HIS AUTHORIZED REPRESENTATIVE AND THAT THE COPY SERVE AS THE COMMITMENT OF THE DEFENDANT. FOR REASONS FOR IMPOSING CONSECUTIVE SENTENCES SEE COURT RECORD OR ATTACHMENT.

A TRUE COPY, ATTEST:

_____ s/Donald G. Alexander

Clerk, Superior Court Justice, Superior Court

STATE OF MAINE
SUPERIOR COURT JUDGMENT AND COMMITMENT

Docket No.	County	Date	DOB
CR 88-365	Kennebec	May 18, 1989	

State of Maine v. Defendant's Name Residence
Richard Morrison

Offense(s) charged:	Charged by:
Unlawful Sexual Contact	_x_ indictment
Count 3	___ information
Class C	___ complaint

Plea: Not guilty

Offense(s) convicted:	Convicted on:
Unlawful Sexual Contact	___ plea of guilty
Count 3	___ plea of nolo
Class C	_x_ jury verdict
	___ court finding

IT IS ADJUDGED THAT THE DEFENDANT IS GUILTY OF THE OFFENSES AS SHOWN ABOVE AND CONVICTED.

_x_ IT IS ADJUDGED THAT THE DEFENDANT BE HEREBY COMMITTED TO THE SHERIFF OF THE WITHIN NAMED COUNTY OR HIS AUTHORIZED REPRESENTATIVE WHO SHALL WITHOUT NEEDLESS DELAY REMOVE THE DEFENDANT TO:

_x_ The custody of the Commissioner of the Department of Corrections, at a facility designated by the Commissioner, to be punished by imprison-

ment for a term of 3 years

x IT IS ORDERED THAT ALL (BUT)_____OF THE FOREGOING SENTENCE BE SUSPENDED AND THE DEFENDANT BE COMMITTED TO THE CUSTODY AND CONTROL OF THE DIVISION OF PROBATION AND PAROLE FOR A TERM OF_____ UPON CONDITIONS ATTACHED HERETO AND INCORPORATED BY REFERENCE HEREIN. SAID PROBATION TO COMMENCE (_____)(UPON COMPLETION OF THE UNSUSPENDED TERM OF IMPRISONMENT). THE DEFENDANT SHALL SERVE THE INITIAL PORTION OF THE FOREGOING SENTENCE AT_____

IT IS FURTHER ORDERED THAT THE CLERK DELIVER A CERTIFIED COPY OF THIS JUDGMENT AND COMMITMENT TO THE SHERIFF OF THE ABOVE NAMED COUNTY OR HIS AUTHORIZED REPRESENTATIVE AND THAT THE COPY SERVE AS THE COMMITMENT OF THE DEFENDANT. FOR REASONS FOR IMPOSING CONSECUTIVE SENTENCES SEE COURT RECORD OR ATTACHMENT.

A TRUE COPY, ATTEST:

_____ s/Donald G. Alexander

Clerk, Superior Court Justice, Superior Court

STATE OF MAINE
SUPERIOR COURT JUDGMENT AND COMMITMENT

Docket No.	County	Date	DOB
CR 88-365	Kennebec	May 18, 1989	

State of Maine v. Defendant's Name Residence
Richard Morrison

Offense(s) charged:	Charged by:
Rape	_x_ indictment
Count 4	___ information
Class A	___ complaint

Plea: Not guilty

Offense(s) convicted:	Convicted on:
Rape	___ plea of guilty
Count 4	___ plea of nolo
Class A	_x_ jury verdict
	___ court finding

IT IS ADJUDGED THAT THE DEFENDANT IS GUILTY OF THE OFFENSES AS SHOWN ABOVE AND CONVICTED.

_x_ IT IS ADJUDGED THAT THE DEFENDANT BE HEREBY COMMITTED TO THE SHERIFF OF THE WITHIN NAMED COUNTY OR HIS AUTHORIZED REPRESENTATIVE WHO SHALL WITHOUT NEEDLESS DELAY REMOVE THE DEFENDANT TO:

_x_ The custody of the Commissioner of the Department of Corrections, at a facility designated by the Commissioner, to be punished by imprison-

ment for a term of 15 years

_____

_x_ IT IS ORDERED THAT ALL (BUT) 10 years OF THE FOREGOING SENTENCE BE SUSPENDED AND THE DEFENDANT BE COMMITTED TO THE CUSTODY AND CONTROL OF THE DIVISION OF PROBATION AND PAROLE FOR A TERM OF 3 years UPON CONDITIONS ATTACHED HERETO AND INCORPORATED BY REFERENCE HEREIN. SAID PROBATION TO COMMENCE (_____)(UPON COMPLETION OF THE UNSUSPENDED TERM OF IMPRISONMENT). THE DEFENDANT SHALL SERVE THE INITIAL PORTION OF THE FOREGOING SENTENCE AT_____

_____

IT IS FURTHER ORDERED THAT THE CLERK DELIVER A CERTIFIED COPY OF THIS JUDGMENT AND COMMITMENT TO THE SHERIFF OF THE ABOVE NAMED COUNTY OR HIS AUTHORIZED REPRESENTATIVE AND THAT THE COPY SERVE AS THE COMMITMENT OF THE DEFENDANT. FOR REASONS FOR IMPOSING CONSECUTIVE SENTENCES SEE COURT RECORD OR ATTACHMENT.

A TRUE COPY, ATTEST:

_____ s/Donald G. Alexander

Clerk, Superior Court Justice, Superior Court

STATE OF MAINE
SUPERIOR COURT JUDGMENT AND COMMITMENT

Docket No.	County	Date	DOB
CR 88-365	Kennebec	May 18, 1989	

State of Maine v. Defendant's Name Residence
Richard Morrison

Offense(s) charged:	Charged by:
Unlawful Sexual Contact	_x_ indictment
Count 6	___ information
Class C	___ complaint

Plea: Not guilty

Offense(s) convicted:	Convicted on:
Unlawful Sexual Contact	___ plea of guilty
Count 6	___ plea of nolo
Class C	_x_ jury verdict
	___ court finding

IT IS ADJUDGED THAT THE DEFENDANT IS GUILTY OF THE OFFENSES AS SHOWN ABOVE AND CONVICTED.

_x_ IT IS ADJUDGED THAT THE DEFENDANT BE HEREBY COMMITTED TO THE SHERIFF OF THE WITHIN NAMED COUNTY OR HIS AUTHORIZED REPRESENTATIVE WHO SHALL WITHOUT NEEDLESS DELAY REMOVE THE DEFENDANT TO:

_x_ The custody of the Commissioner of the Department of Corrections, at a facility designated by the Commissioner, to be punished by imprison-

ment for a term of 3 years

_x_ IT IS ORDERED THAT ALL (BUT)_____ _OF THE FOREGOING SENTENCE BE SUSPENDED AND THE DEFENDANT BE COMMITTED TO THE CUSTODY AND CONTROL OF THE DIVISION OF PROBATION AND PAROLE FOR A TERM OF_____ UPON CONDITIONS ATTACHED HERETO AND INCORPORATED BY REFERENCE HEREIN. SAID PROBATION TO COMMENCE (_____)(UPON COMPLETION OF THE UNSUSPENDED TERM OF IMPRISONMENT). THE DEFENDANT SHALL SERVE THE INITIAL PORTION OF THE FOREGOING SENTENCE AT_____

IT IS FURTHER ORDERED THAT THE CLERK DELIVER A CERTIFIED COPY OF THIS JUDGMENT AND COMMITMENT TO THE SHERIFF OF THE ABOVE NAMED COUNTY OR HIS AUTHORIZED REPRESENTATIVE AND THAT THE COPY SERVE AS THE COMMITMENT OF THE DEFENDANT. FOR REASONS FOR IMPOSING CONSECUTIVE SENTENCES SEE COURT RECORD OR ATTACHMENT.

A TRUE COPY, ATTEST:

_____ s/Donald G. Alexander

Clerk, Superior Court Justice, Superior Court

STATE OF MAINE
SUPERIOR COURT JUDGMENT AND COMMITMENT

Docket No.	County	Date	DOB
CR 88-365	Kennebec	May 18, 1989	

State of Maine v. Defendant's Name Residence
Richard Morrison

Offense(s) charged:	Charged by:
Assault	_x_ indictment
Count 7	___ information
Class D	___ complaint

Plea: Not guilty

Offense(s) convicted:	Convicted on:
Assault	___ plea of guilty
Count 7	___ plea of nolo
Class D	_x_ jury verdict
	___ court finding

IT IS ADJUDGED THAT THE DEFENDANT IS GUILTY OF THE OFFENSES AS SHOWN ABOVE AND CONVICTED.

_x_ IT IS ADJUDGED THAT THE DEFENDANT BE HEREBY COMMITTED TO THE SHERIFF OF THE WITHIN NAMED COUNTY OR HIS AUTHORIZED REPRESENTATIVE WHO SHALL WITHOUT NEEDLESS DELAY REMOVE THE DEFENDANT TO:

_x_ The custody of the Commissioner of the Department of Corrections, at a facility designated by the Commissioner, to be punished by imprison-

ment for a term of 364 days

_____

_x_ IT IS ORDERED THAT ALL _____OF THE FOREGOING SENTENCE BE SUSPENDED AND THE DEFENDANT BE COMMITTED TO THE CUSTODY AND CONTROL OF THE DIVISION OF PROBATION AND PAROLE FOR A TERM OF One year UPON CONDITIONS ATTACHED HERETO AND INCORPORATED BY REFERENCE HEREIN. SAID PROBATION TO COMMENCE(_____)(UPON COMPLETION OF THE UNSUSPENDED TERM OF IMPRISONMENT). THE DEFENDANT SHALL SERVE THE INITIAL PORTION OF THE FOREGOING SENTENCE AT_____

_____

IT IS FURTHER ORDERED THAT THE CLERK DELIVER A CERTIFIED COPY OF THIS JUDGMENT AND COMMITMENT TO THE SHERIFF OF THE ABOVE NAMED COUNTY OR HIS AUTHORIZED REPRESENTATIVE AND THAT THE COPY SERVE AS THE COMMITMENT OF THE DEFENDANT. FOR REASONS FOR IMPOSING CONSECUTIVE SENTENCES SEE COURT RECORD OR ATTACHMENT.

A TRUE COPY, ATTEST:

_____ s/Donald G. Alexander

Clerk, Superior Court Justice, Superior Court